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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,
and
THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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PETITIONER'S REPLY BRIEF

1.

The Nevada Domicile.

Respondent's brief does not reveal that the courts below conclusively found upon the evidence that petitioner had been domiciled in Nevada for many years up to and during the early months of the marriage. Its statement of chronology is in error. A brief resume of certain of the judicial findings below is stated hereinafter.

Findings by the Trial Court: The testimony and documentary evidence established defendant's residence and domicile in Nevada for some years prior to the divorce. Many years prior to the marriage defendant had planted his "grass roots" in Nevada and continued this conduct "to a great extent" even after the marriage (R. 504-505).

Findings by the Trial Court and the Appellate Division: At the time of the marriage, defendant was domiciled in Nevada and plaintiff was domiciled in California. A few months after the marriage they became jointly domiciled in California (R. 506, 529).

Findings by the Court of Appeals: There was sufficient evidence to justify the findings below as to defendant's good faith domicile in Nevada. "That proof included a showing that defendant had lived and voted and owned property in Nevada for many years before his marriage to plaintiff, *that plaintiff and defendant lived there together in the early months of their marriage,* that defendant returned there some months before the divorce and that defendant has continuously maintained a residence in Nevada since the divorce." (R. 542); (Emphasis supplied).

The Evidence: In addition to conclusive documentation and testimony supporting the bona fides of petitioner's Nevada residence, there was documentation as to respondent's Nevada residence. In 1949 she gave Reno, Nevada, as her residence when applying for an automobile operator's license in California (R. 144; Def. Ex. B). In 1950 plaintiff applied in California for a nonresident's registration of her Nevada motor vehicle (R. 145-146; Def. Ex. C). In the parties' joint 1949 and 1950 federal income tax returns they both stated Reno, Nevada, to be their place of residence (R. 274-275; Def. Ex. F, par. 3, pp. 17-18; Adm. R. 230).

The facts are crystal clear, that the parties were jointly domiciled as husband and wife during the marriage only in the States of Nevada and California, and that no other State ever had anything to do with the marriage, except for the performance of the marriage ceremony in Connecticut.

2.

The Penalty of 1170-b.

Section 1170-b imposed a penalty upon petitioner for invoking the federal constitution as a defense to the action.

By its express terms, only if the petitioner defended the separation action upon the grounds that it was barred by the Nevada decree which was entitled to full faith and credit, does that statute come into play.

Defendant would have been compelled to default or otherwise submit to the separation claim, if he did not wish to be subjected to Sec. 1170-b. Plaintiff's complaint did not question the Nevada decree. She did not assume her affirmative burden to plead an alleged defect in the Nevada decree in order to come within Sec. 1170-b as an alternative to a separation judgment. Thus, the burden was thrust upon defendant to assert as a defense his constitutional rights and at his peril.

If defendant had defaulted in answering to the complaint and plaintiff had proved her separation cause to the satisfaction of the trial court, she might have been awarded a separation judgment as a married woman and statutory alimony as such. Defendant had the unpleasant alternative of fighting the separation claim as a married man and thus nullifying the effect of his divorce decree. Because the non-resident defendant defied the threat of Sec. 1170-b and interposed his defense of the divorce decree and rested upon his constitutional rights; the penalty of maintenance, as New York alleged justice required, was imposed upon him.

Sec. 1170-b is a harsh and unreasonable weapon to compel a non-resident former husband to fight the separation claim and nullify his divorce decree, or to default, and thus to waive his constitutional defense of full faith and credit, under penalty of exaction of maintenance.

3.

Plaintiff's Change of Theory after Sequestration.

It is surprising that there should have been such complacent acceptance below of the sneak attack upon defendant's property under the label of a separation action. The

opinion of the Court at Special Term, rendered upon defendant's initial motion to dismiss the action, reveals (133 N. Y. S. 2d 314) that defendant sought to vacate the sequestration upon the grounds that the Court lacked jurisdiction of the subject matter and of his person, and that the seizure of his property violated his rights under the federal constitution. That Court's decision permitted defendant to preserve his jurisdictional objections throughout the action while defending himself upon the merits. That Court undisturbedly observed that plaintiff belatedly conceded that she might attempt to secure relief under 1170-b, even though her initial processes and instruments of seizure of defendant's property made no disclosure of this.

In *Schuster* v. *Schuster,* (1950) 9 N. J. Super. 11, the plaintiff wife sued for a divorce and obtained personal jurisdiction of the husband, who thereafter became a nonresident of New Jersey during the pendency of the action. Subsequently, as the result of a statute enacted also during the pendency of the action, plaintiff amended her complaint so as to add a cause of action for support and maintenance. The Court, citing *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565, held it to be a violation of the due process clause of the federal constitution to permit the addition of a different cause of action for separate maintenance against a nonresident, even though he appeared generally in the divorce action.

Much graver is the violation of due process herein. The Court had no personal jurisdiction of petitioner and seized his property solely for the in rem purposes of the separation action. The purposes were thwarted by the subsequent occurrences which converted the action into one for relief for a divorced woman under Sec. 1170-b.

The continued seizure and retention of defendant's property after judgment dismissing the separation claim and sustaining the Nevada divorce could not be for any genuine in rem purposes. There was no attachment for the

purposes of Sec. 1170-b, but an arbitrary deviation of defendant's property, as an afterthought, to the judgment of maintenance.

The Divisible Divorce.

In order to have a divisible divorce there must be a divisible mariage. Nevada and California say that after the rendition of the divorce decree making no support provisions, the support duty dies with the marital status. New York, an interloper in the marital affairs of these parties, welcomes the nonresident Mrs. Vanderbilt and offers her new financial opportunities.

The morality of a husband's duty to support his wife is not the basis of any legal right in the wife to sue a husband for maintenance in New York. As the cases cited at pages 17 and 18 of our main brief disclose, the wife may not sue her husband for maintenance in an action independent of the award of the main relief of separation or divorce. The statutory relief of alimony is merely incidental to the wife's victory in the matrimonial action. C. P. A. Secs. 1164, 1155; *Fein* v. *Fein*, 261 N. Y. 441.

The wife's sole common law remedy in New York is to sue for the amount already expended by her for necessaries upon the theory of her implied agency for her husband.

It is not fair that a general duty to support should be held to independently survive a divorce decree and be the basis of subsequent attachment, when all during the marriage that duty could not be the subject of suit for its direct enforcement.

In other words, if a woman is married, she may not sue for maintenance. In New York, her suit must seek a separation or divorce. Alimony then flows in consequence. But if the woman be already divorced by her husband through foreign ex parte decree, then all she has to do is to pretend with the State that she is still a married woman, and if the

man should be so bold as to raise a constitutional defense of full faith and credit resting upon the divorce decree, then she procures maintenance under Sec. 1170-b. The statute is flexibly designed to trap the husband in either event.

The form of the remedy is objectionable because of its essential unreasonableness and arbitrary application herein to the nonresident petitioner.

4.

New York Public Policy.

The public policy of New York is confusing. Even the Court of Appeals, cautiously and with limitation, said below, that Sec. 1170-b only has changed the public policy *to the exent that it applies* (R. 547).

We say that New York has no reasonable or consistent public policy upon which Sec. 1170-b is founded. Sec. 1170-b has been enforced herein as a legislation of policy discriminatorily operating upon a marriage between two nonresidents over whom New York never had joint jurisdiction.

As we have shown in our main brief, a New York ex parte divorce judgment is conclusive upon the defendant who may not subsequently commence a counter-action as though the marital status still existed. No statute has written Sec. 1170-b into New York divorce judgments as a reservation.

A New York judgment may not be vacated after the expiration of two years since its entry. *Gysin* v. *Gysin*, 263 N.Y. 509.

New York Civil Practice Act, Sec. 528, is strict in its application. Its pertinent provisions are as follows:

> "A motion to set aside a final judgment, for error in fact not arising upon the trial, shall not be heard, . . . after the expiration of two years since the filing of the judgment roll, . . ."

It is inconceivable that a New York husband's ex parte divorce judgment, years later (perhaps after his witnesses as to the wife's adultery had died), would be subject to a New York separation action by his wife, coupled with a claim that according to Sec. 1170-b justice required that she be maintained by the former husband.

New York has subjugated the laws and decrees of other States to its own purposes. It did so herein upon the solicitation of a visiting spouse who made no effort to seek relief against her non-resident husband in any State of the marital domicile.

The unreasonableness of New York's action herein is all the more apparent when it is observed that Sec. 1170-b was not even enacted when the parties were physically separated in California in September 1952.

5.

(A) Lest there be any misconception about it, we should like to reiterate that it very plainly appears, both in the trial Court's first decison and in its judgment, that the claim as to a separation was dismissed *upon the merits* (R. 3, 344). How could defendant contest the charges of misconduct once they were dismissed on the merits, and plaintiff denied a separation? It is just not reasonable nor within the gamut of legal experience to assert that one has had an opportunity to answer charges in full trial upon the merits after those charges have been dismissed. This is just another casual innovation of theory, to force a liability.

(B) Respondent's brief raises the rather tenuous and farfetched contention that because the separation claim was dismissed, petitioner may not attack the award of maintenance. It hardly could be expected that a successful party should or could appeal from that portion of a judgment which sustained his claim that faith and credit be

given to his Nevada decree. Petitioner did not seek affirmative relief in the action. He is defending himself and his property from assault. Moreover, this contention was not made upon the appeal below.

(C) Reference in respondent's brief to Nevada enabling support statutes have nothing to do with the decree of divorce granted petitioner. That latter form of decree has been held in Nevada and New York to cut off all rights of the divorced woman to support although the issue of support has not been litigated or made subject of other judicial disposition. See: *Lynn* v. *Lynn*, 302 N. Y. 193, at pp. 201-203, and cases there cited; (cert. den. 342 U. S. 849).

Conclusion

The dissenting opinion below of Judge FULD (R. 548) again deserves special attention in connection with what we have said in this reply. He wrote the majority opinion in *Lynn* v. *Lynn*, 302 N. Y. 193, and joined in the affirming opinion in *Estin* v. *Estin*, 296 N. Y. 308 (affd. 334 U. S. 541).

Judge FULD holds up a stop signal to judicial efforts to force an extraterritorial support policy. He shows that in New York State "The duty of support flows from the marital status;" and "in itself furnishes no foundation for a cause of action" (R. 549).

Judge FULD also points out that the limitations of the decisions in *Estin* v. *Estin* (*supra*) and *Lynn* v. *Lynn* (*supra*) were to preserve the property right vested in the wife by the prior support order, which could not be extinguished by a subsequent divorce judgment in the absence of personal jurisdiction over the wife (R. 550).

Judge FULD expressly states that he cannot agree with Judge BLACK's conclusion in *Armstrong* v. *Armstrong*, 350 U. S. 568, 575, *et seq.*, to the effect that a denial of alimony is a personal judgment depriving a woman of a right.

Judge FULD aptly summed the opposition to that conclusion as follows:

> "I cannot accept that reasoning, for it seems to me to rest on the erroneous premise that a mere incident of the marital status, which 'in itself furnishes no foundation for a cause of action' (*Querze* v. *Querze*, *supra*, 290 N. Y. 13, 18), is the equivalent of an independent right."

A New York, California or Nevada woman found guilty of misconduct sacrifices enforcement of the support duty. Nevada adjudicated the misconduct of this plaintiff. New York thereafter had no valid basis for treating the plaintiff as a married woman in order that she might synthetically conform to its statutory jurisdictional and other requirements for the maintenance of a separation action. Sec. 1170-b was expressly designed to frustrate the effect of foreign ex parte divorce decrees. So long as it might have sought to protect the genuine New York wife against the errant New York husband, we believe its purpose had merit, although its method be wrong. When applied, as it was herein, to nonresidents, it is deceptive, arbitrary, unreasonable and unconstitutional.

Respectfully submitted,

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